93-838

Supreme Court, U.S.
FILED
OCT 19 1993
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Richard G. Perreault
Petitioner

v.

The Honorable Harriet Fishman
in her capacity as a Marital Master
for the Superior Court of New Hampshire

The Honorable Bruce Mohl in his capacity as a
Justice for the Superior Court of New Hampshire

The Honorable David A. Brock in his capacity as
Chief Justice for the New Hampshire Supreme Court
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard G. Perreault
75 Chesley Hill Road
Rochester, NH 03867

36 pp

1. Were the federal lower courts justified in summarily dismissing a complaint brought as an original action on the basis that federal district courts do not possess appellate, non-habeas corpus, jurisdiction over the final decisions of state courts?

2. Were the federal courts justified in dismissing a complaint brought as an original action on the basis of the doctrine of res judicata where the state supreme court summary decision in the case, although final, was not a decision on the merits as required by state case law?

3. Was the New Hampshire Supreme Court justified in summarily dismissing the defendant's constitutional challenge to a lower state court's order because it violated the 'Equal Protection Under the Law' clause on the basis that in New Hampshire litigants are entitled to equal protection under the law only where they are equally situated?

4. Did the state courts violate the 'Equal Protection Under the Law' clause by ordering a divorced and remarried father to pay college expenses for the children of his first family but not for the children of his second family and thereby not treating equally the children of first and subsequent marriages?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard G. Perreault, respectfully prays that a Writ of Certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the First Circuit affirming the decision of the Federal District Court for the District of New Hampshire to summarily dismiss his civil rights complaint. Your petitioner, in his civil rights suit, complains of violations of his Fourteenth Amendment Rights to 'Due Process' and 'Equal Protection Under the Law and Thirteenth Amendment prohibitions against 'Involuntary Servitude' committed against him by the named New Hampshire judicial officers. Specifically your petitioner claims that the Superior Court of New Hampshire violated his 'Equal Protection Under the Law' Rights by requiring him, as a divorced parent, to pay college costs of his adult son, while married parents are not required to do likewise, especially since he is unable and not required to contribute to the college education of the adult children of his second marriage. Your petitioner also complains that ordering him to contribute to the college expenses of his emancipated adult son is a form of Involuntary Servitude which violates the Thirteenth Amendment against same. And finally your petitioner complains in his civil rights suit, because New Hampshire has no intermediary court of appeals, the New Hampshire Supreme Court's summary dismissal of his

appeal of state lower court order, on the grounds of sound judicial discretion rather than on the merits, has violated his fundamental right to have at least one meaningful appeal of a state lower court's order.

OPINIONS BELOW

The opinion of the state lower court (Carroll County New Hampshire Superior Court) and the New Hampshire Supreme Court opinion are unreported and appear in Appendix A and B of this petition. Similarly the opinions of the United States District Court for the District of New Hampshire and the United States Court of Appeals for the First Circuit are included in Appendix C and D of the petition.

JURISDICTION

This Honorable Court's jurisdiction is invoked under Supreme Court of the United States Rule 10 paragraphs (a), (b), and (c). 28 U.S. Code § 1331 (3) and 1343(4).

STATUTORY PROVISIONS INVOLVED

Title 42 USC Sections 1983, 1984, 1985, and 1986.

Title 28 USC Sections 1331 (3) and 1343(4)

13th Amendment to the United States Constitution

14th Amendment to the United States Constitution - Equal Protection Under the Law

14th Amendment to the United States Constitution - Due Process

STATEMENT OF THE CASE

The appeal in this action arises from a United States District Court case in the District of New Hampshire filed in March 30, 1993. The plaintiff, Richard G. Perreault, filed his complaint under the Federal Civil Rights Acts 42 U.S. Code Section 1983, 1984, 1985, 1986. In the action plaintiff sought a declaratory judgment, prospective innunctive relief, compensation for cost incurred in litigating this action, and redress for deprivation of the rights secured to the plaintiff by the Constitution and laws of the United States and the Constitution laws and common laws of the State of New Hampshire.

The plaintiff in District Court claimed that the defendants both individually and together did conspire to deny, under the color of law, certain rights and privileges guaranteed to the plaintiff by the 'EQUAL PROTECTION UNDER THE LAW' clause of the Fourteenth Amendment of the United States Constitution in that he is being required by court order to contribute to the education of the children of first marriage when:

A. Similarly situated married parents are not so required;

B. If he were still married to his former wife he would not be required to do so;

C. If he were a single un-divorced or custodial parent he would not be required to do so;

D. He has two step children from his second marriage that he is not required to do so.

The plaintiff in District Court made two additional allegations. He claimed that the defendants both individually and together did conspire to deny, under the color of law, certain rights and privileges guaranteed to the plaintiff by the "Neither slavery nor Involuntary Servitude" clause of the Thirteenth Amendment of the United States

Constitution in that he is being required by court order, against his will, to contribute to the college education of an adult emancipated offspring. He also alleged that the New Hampshire Supreme Court by summarily dismissing his Rule 7 Notice of Appeal denied him his civil right to one meaningful appeal guaranteed to him by his Fourteenth Amendment Due Process Rights. See Plaintiff's complaint.

The District Court on April 13, 1993 summarily dismissed the plaintiff's complaint without making service on the named defendants. The court based its summary dismissal on its conclusion that:

> (1) the plaintiff was requesting it to exercise appellate jurisdiction over the final decision of a state court and;
>
> (2) the plaintiff because he had made an appeal to the New Hampshire Supreme Court was estopped by the doctrine of res judicata from raising the same issue in federal district court.

On May 4, 1993 the plaintiff gave Notice of Appeal to the United States Court of Appeals for the First District. Said court on July 23, 1993 affirmed the district court order and

dismissed the plaintiff's appeal without allowing his oral arguments.

REASONS FOR GRANTING THE WRIT

The plaintiff has had his constitutional rights violated by the state courts and the federal district and circuit courts have chosen to summarily dismiss his civil rights complaints without granting him a hearing on the merits. New Hampshire courts have ruled that divorced parents are responsible for providing their children with a college education while married or never married parents are not so burdened. Your plaintiff/appellant argues that such a ruling violates the 14th Amendment 'Equal Protection Under the Law' provision. Other states have not followed New Hampshire. See LeClair v. LeClair; NH Supreme Court Slip Opinion May 14, 1993; Blue v. Blue, PA Supreme Court Eastern District, Slip Opinion November 13, 1992; Adam v. Adam, RI Supreme Court, Slip Opinion May 26, 1993. The New Hampshire Supreme Court has determined that:

> "The first question in an equal protection analysis is whether the State action in question treats similarly situated persons

differently...If the persons are not similarly situated...no equal protection problem is involved." LeClair v. LeClair, ibid at page 6.

Your plaintiff/appellant takes issue with above determination since, inter alia, its acceptance would lead to the conclusion that because poor people are not equally situated to rich people, poor people are not entitled to the same protections under the law as the rich.

The lower courts' dismissal of the plaintiff's/appellant's complaint is predicated on their conclusion that the plaintiff is attempting appeal and/or to re-litigate in federal district court matters that have been exhaustively litigated in the state courts. The lower court asserts that on the basis of Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 317 (1st Cir. 1992) it lacks such appellate jurisdiction. Moreover, the federal district court for the district of New Hampshire is asserting that because the plaintiff has exhausted all his state remedies, including an appeal to the New Hampshire Supreme Court, the doctrine of res judicata Radkay v. Confalone, 133 N.H. 294, 575 A.2d 355 (1990)], precludes them from re-litigating the matter in

federal district court. Your appellant, the plaintiff below, specifically challenges both assertions by the lower courts.

The plaintiff asserts that his complaint, contrary to the assumptions of the District Court, is an original action, brought in federal court not an attempt to appeal a state court decision after exhausting all his state court remedies. A careful reading of the plaintiff's complaint reveals that nowhere does he ask for, request, or seek in federal district court a review or appeal from any state court decision. The plaintiff has never asked or requested that the lower court take, "appellate jurisdiction over the final decisions of state courts". The plaintiff has requested that the federal district court, pursuant to 28 U.S. Code § 1331 (3) and 1343(4) as well as 42 U.S. Code § 1983, 1984, 1985 and 1986 take jurisdiction over an ORIGINAL complaint alleging the deprivation by state actors of certain civil rights guaranteed to the plaintiff by the state and federal constitutions.

28 U.S. Code § 1331 (3) grants original jurisdiction to federal district courts "of all civil actions arising under the Constitution, laws or treaties of the United States". Similarly, 28 U.S. Code § 1343 (4) vests in federal district courts original jurisdiction over civil actions authorized by

law which seek recovery from damages or the securing of "equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote". And finally, in relevant part 42 U.S. Code § 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be libel to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The federal court has concluded that because the plaintiff has invoked the jurisdiction of the state courts he "...may not seek to re-litigate the issues foreclosed by the rulings of the state courts". Nevertheless, federal case law indicates otherwise. "...the action claimed deprivation by the husband of the plaintiff's right to the custody and society of her three minor children, a matter over which the district court did have jurisdiction, exerciseable once state custody proceedings

were concluded" Raftery v. Scott, 756 F.2d at 338 (1985) summarizing Kelser v. Anne Arundel County Dept. of Social Services, 679 F.2d 1092 (4th Cir. 1982). Emphasis not in the original. For a New Hampshire case indicating that the federal district court has jurisdiction even though the defendant has chosen first to litigate the matter in state court and exhaust his remedies therein see Bundy v. Wilson. 815 F.2d 125 (1st Cir. 1987).

The plaintiff is surprised by the lower court's reliance on Radkay v. Confalone, 133 N.H. 294, 575 A.2d 355 (1990) to support its contention that the plaintiff is barred by the doctrine of res judicata from raising in federal district court matters previously litigated in state courts. The plaintiff alleges that Radkay stands for exactly the opposite of the district court contentions.

> "BROCK, C.J. The plaintiff, Randall D. Radkay, filed suit in the superior court, seeking damages alleged to have resulted from the breach of a lease agreement. The defendant, James Confalone, moved to dismiss, claiming that the suit was barred by the doctrine of res judicata because the plaintiff could have raised

his claims for damages in connection with an earlier petition for declaratory judgment involving the same lease. The Superior Court (Temple, J.), relying on our decision in Eastern Marine Construction Corp. v. First Southern Leasing, 129 N.H. 270.525 A.2d 709 (1987), dismissed the action and the plaintiff appeals. For the reasons that follow, we reverse and remand."

"Accordingly, we conclude that the trial court erred in granting the defendant's motion to dismiss. Eastern Marine is not dispositive of the matter, and the plaintiff's claims are not barred by res judicata."

Moreover, as noted in Aubert v. Aubert, 129 N.H. 422, 529 A.2d 909 (1987):

"That a spouse can sue another spouse in tort cannot be questioned. See, e.g., Schneider v. Schneider, 110 N.H. 70, 260 A.2d 97, 98 (1969) (citing Morin v. Letourneau, 102 N.H. 309, 156 A.2d 131 (1959)). Nor can it be argued that a civil action in tort is the same "cause of

> action" for res judicata purposes. Although we have emphasized that "a change in labels is not sufficient to remove the [preclusive] effect of [a] prior adjudication", Lougee v. Beres, 113 N.H. 712, 714, 313 A.2d 422, 424 (1973) (quoting Grace v. Grace, 394 F.2d 127, 128 (2d Cir. 1968)), we think it clear that a civil action in tort is fundamentally different from a divorce proceeding, and that the respective issues involved are entirely distinct".

The plaintiff asserts in likewise fashion that a Rule 7 New Hampshire Supreme Court Notice of Appeal is fundamentally different from a Civil Rights complaint in federal district court and therefore res judicata does not lie. Moreover, the plaintiff asserts that because the New Hampshire Supreme Court summarily declined to accept his appeal in accordance with its Rule 25, and therefore he never received a hearing or decision on the merits (the New Hampshire Supreme Court never reviewed or determined the merits of his case) res judicata does not lie.

New Hampshire Supreme Court Rule 3 defines "Declination of acceptance order" to mean that: "The supreme

court does not deem it desirable to review the issues in a case, as a matter of sound judicial discretion and with no implication whatever regarding its views on the merits." Emphasis added. See also State v. Cooper, 127 N.H. 119, 498 A.2d 1209 (1985).

Finally, the plaintiff notes that an important issue in this case is whether or not your pro se appellant will be allowed to have his day in court; whether the decision will be on the merits of the case or on procedural matters; whether for good cause shown justice will be allowed to prevail. "It is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial". "These considerations are necessarily encompassed within the touchstone of our practice - as justice may require." Llewellyn v. Follansbee, 94 N.H. 111 at 114, 47 A.2d 572 (1946). "...neither should he be compelled to submit to a judgment which unjustly concludes his rights without an opportunity to be heard. Such a result can happen only through a defective administration of justice". Clough v. Moore, 63, N.H. 111 at 112. "One commentator, referring to

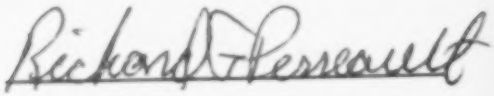
Chief Justice Doe, has said: 'Until his memory is forgotten, cases in New Hampshire will be tried expeditiously and upon their merits; justice will not be strangled in the net of form'....'9 HARV. L. REV. 534, 535 (1986)". Petition Of Public Serv. Co. Of N.H., 125 N.H. 595 at 602, 484 A.2d 1139 (1984).

"While the memory of Doe remains, not entirely forgotten, this is a case in which justice, and the parties seeking it out, have clearly been 'strangled in the net of form'...'and the niceties of procedure'." Petition Of Public Serv. Co. Of N.H., 125 N.H. 595 at 602 (1984). Apparently the memory of Chief Justice Doe has faded even more since 1984.

CONCLUSION

For the reasons set forth herein above a Writ of Certiorari should issue to review the decision of the First Circuit Court of Appeals in this matter.

Respectfully submitted,



Richard G. Perreault, Pro se

APPENDIX A

The State of New Hampshire

Carroll SS Superior Court

No. E-7774 August Term 1992

Diane (Perreault) LeClerc v. Richard G. Perreault

Master Recommends:

Plaintiff filed a petition for modification of child support wherein she requests that defendant pay support pursuant to the New Hampshire child support guidelines for the 1 minor child still living with her, pay the arrearage owed from the time the oldest child turned 18 years of age until his high school graduation and pay half of the older child's unpaid tuition at New Hampshire Technical College. In addition, she is requesting payment of half of the uninsured medical expenses for the parties' minor child.

The Master finds no substantial change of circumstances to increase child support to the guideline amount. Defendant shall continue to pay $60.00/week until the youngest child turns 18 years of age or graduates from high school, whichever occurs later. In addition, although

$60.00/week to $100.00/week, plaintiff must demonstrate that circumstances have changed to allow her to get support for the months between the older child's 18th birthday and his high school graduation since the revised statute was not in existence at the time of the parties' divorce. Since plaintiff failed to meet her burden of proof, the master finds that there is no child support arrearage.

Finally, there remains the issue of payment of the oldest child's college expenses, the total of which this year (after scholarships and loans) is $2,500.00. The parties shall equally divide the outstanding balance on said tuition. In the event that the defendant is unable to pay $1,250.00 in one lump sum, defendant shall make payments as follows: $250.00 by September 30, 1992, $250.00 by November 30, 1992, $250.00 by January 30, 1993, $250.00 by March 1, 1993 and $250.00 by May 1, 1993. Payments shall be made to the plaintiff.

The parties shall equally divide the outstanding balance on next year's tuition bill.

The parties shall be equally responsible for any uncovered medical expenses for the parties' minor child.

Request that payments be made through NHDHS is denied.

Date: 8-26-92

Master Harriet J. Fishman
Marital Master

Date: 9-2-92 The Master's Recommendation having been read and reviewed is hereby approved. Decree in accordance therewith.

Bruce Mohl
Presiding Justice

September 4, 1992

cc: Philip S. Rader, Esq.

Richard G. Perreault

THE STATE OF NEW HAMPSHIRE

CARROLL COUNTY SUPERIOR COURT

Diane M. (Perreault) LeClerc

vs.

Richard G. Perreault
Superior Court Docket #E7774
Supreme Court Docket #92-642

Supplemental Decree

After reviewing the September 2, 1992 and September 30, 1992 Court Orders as well as the Notice of Appeal, the Master recommends that the following findings be incorporated in the above-mentioned orders:

1. There has been a substantial change in circumstances as a result of the parties' oldest son's attendance at college and the associated obligation to pay tuition.

2. Defendant has the ability to pay his share of the court-ordered tuition, the sum of $1,250, either in one lump sum or periodic payments as provided by the decree, taking into consideration his income and equity in his home.

3. There has been no substantial change of circumstances as the same relates to the parties' youngest

son and therefore child support shall not be increased as was requested by Plaintiff.

November 13, 1992 _____

Harriet J. Fishman, Master

Master's recommendation approved. Order in accordance therewith.

November 13, 1992 _____

Presiding Justice

November 23, 1992

cc: Harriet Fishman, Master
Philip Rader, Esq.
Richard Perreault, Pro Se
Bruce Mohl, PJ
Howard Zibel, Clk. Supreme Ct.

APPENDIX B

The State of New Hampshire

Supreme Court

In Case No.:

92-642 Diane M. (Perreault) LeClerc v.Richard G. Perreault

the court upon February 17, 1993 made the following order:

The court having reviewed the notice of appeal, the decision below is summarily affirmed in accordance with Rule 25(1)(a) on the basis that no substantial question of law is presented by the appeal, and the court does not disagree with the result below.

Distribution:
Phillip S. Rader, Esquire
Mr. Richard G. Perreault
Carroll County Superior Court E-7774
Hon. William O'Neill
Master Harriet Fishman
Theresa Hayes, Supreme Court
File

Howard J. Zibel

Clerk

APPENDIX C

U.S. District Court
District of N.H.
Filed

Apr. 13, 4:52 PM '93

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Perreault

v. Civil Action No. 1:93-cv-00155-SD

Fishman

JUDGMENT

JUDGMENT is entered in accordance with Report and Recommendation of Magistrate Judge Barry dated April 1, 1993 and Order of Senior Judge Devine dated April 13, 1993 directing that a judgment of dismissal be expeditiously entered in this action. (Signed by Clerk James R. Starr)

By the Court,

Clerk

Date: April 13, 1993

cc: Richard G. Perreault

U.S. District Court
District of N.H.
Filed

Apr. 13, 2:22 PM '93

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Richard G. Perreault

v. Civil No. 93-155-SD

The Honorable Harriet Fishman
in her capacity as a Marital
Master for the Superior Court of New Hampshire;
The Honorable Bruce Mohl in his
capacity as a Justice of Superior
Court of New Hampshire;
The Honorable David A. Brock,
in his capacity as Chief Justice
of the New Hampshire Supreme Court

ORDER

Richard G. Perreault, plaintiff pro se, objects to a Report and Recommendation (R & R) of the magistrate judge.

1. Background

Plaintiff was divorced from Diane LeClerc on September 11, 1979. In April 1992 LeClerc petitioned the Superior Court of Carroll County for modification of certain court orders. Her request was to the effect that plaintiff be

required to contribute to the college educations of the children of their marriage.

Hearing on this petition was held in August of 1992, and on September 2 of that year, the court issued an order requiring the plaintiff to pay one half of the college tuition of the oldest child of the marriage for the years 1992-93 and 1993-94.

Contending that such order violated his constitutional right to equal protection, plaintiff sought relief in the New Hampshire Supreme Court, which dismissed his appeal. Eschewing a petition for certiorari to the Supreme Court of the United States, he once again seeks to relitigate the matter in the court.

2. Discussion

As the magistrate judge correctly pointed out, federal courts, at the trial and intermediate appellate levels, lack appellate jurisdiction over the final decisions of state courts. Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 317 (1st Cir. 1992). And having followed the litigation route in the state court forums, plaintiff is foreclosed from further litigation of the issue in this court.

Established to avoid litigation, the doctrine of res judicata holds that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action. Radkay v. Confalone, 133 N.H. 294, 297, 575 A.2d 355, 357 (1990). The term "cause of action" means the right to recover, and refers to all theories on which relief could be claimed arising out of the same factual transaction in question. Id. The state courts of New Hampshire are clearly "courts of competent jurisdiction" in which to resolve all issues that plaintiff sought or could have sought to raise concerning his perception that the order that he pay college tuition was somehow illegal. Having invoked such jurisdiction, plaintiff may not here seek to relitigate the issues foreclosed by the ruling of the state courts.*

3. Conclusion

The magistrate judge was correct in his recommendation that this complaint should be dismissed. Document no. 2. Accordingly, it is herewith ordered that the plaintiff's objections be overruled (document no. 3) and that a judgment of dismissal be expeditiously entered in this action.

SO ORDERED.

Shane Devine, Senior Judge
United States District Court

April 13, 1993
cc: Richard G. Perreault, pro se

*Contrary to plaintiff's contention, there is no constitutional or inherent right of appeal. United States v. Young, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1-24 (1976). New Hampshire has, accordingly, limited the appellate right to a discretionary determination by its supreme court as to whether that court will accept appeals. State v. Cooper, 127 N.H. 119, 124, 498 A.2d 1209, 1213 (1985).

APPENDIX D
(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 93-1481

RICHARD G. PERREAULT

Plaintiff, Appellant,

v.

HARRIET FISHMAN, ETC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Shane Devine, U.S. District Judge]

Before
Breyer, Chief Judge,
Selya and Boudin, Circuit Judges.

Richard G. Perreault on brief pro se.
Jeffrey R. Howard, Attorney General, and Susan S. Geiger, Senior Assistant Attorney General, on brief for appellees, The Honorable Harriet Fishman, The Honorable Bruce Mohl, and the Honorable David A. Brock

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July 23, 1993

Per Curiam. We affirm the judgment dismissing plaintiff's action substantially for the reasons stated by the district court. Having had an opportunity to challenge the child support award in state court, plaintiff may not raise in federal court either the same challenges or new ones which could have been presented to the state court. Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 81 (1984) ("a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"); Marine Construction Corp. v. First Southern Leasing, Ltd., 129 N.H. 270, 274-75, 525 A.2d 709, 712 (1987) (barring all theories which could have been raised in the earlier litigation; "[t]he central policy 'exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action'"); Restatement (Second) of Judgments § 22(2)(b).

There is no merit to plaintiff's claim that the New Hampshire Supreme Court denied him due process by

summarily rejecting his appeal. Lindsey v. Normet, 405 U.S. 56,8 77 (1972) (no constitutional right to an appeal).

Plaintiff's request for oral argument is denied, and the judgment is affirmed.